American Bar Association
www.supremecourtpreview.org

No. 07-543

IN THE
SUPREME COURT OF THE UNITED STATES

---

AT&T CORPORATION, PETITIONER,

v.

NOREEN HULTEEN, ET AL., RESPONDENTS.

---

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
FOR THE *NINTH CIRCUIT*

---

# BRIEF OF *AMICUS CURIAE* AARP IN SUPPORT OF RESPONDENTS URGING AFFIRMANCE

---

JAY E. SUSHELSKY
Counsel of Record
AARP FOUNDATION LITIGATION

MELVIN RADOWITZ
AARP

601 E Street, NW
Washington, DC 20049
(202) 434-2060

COUNSEL FOR *AMICUS CURIAE* AARP

## TABLE OF CONTENTS

Page

TABLE OF CONTENTS ..... i

TABLE OF AUTHORITIES ..... iii

STATEMENT OF INTEREST ..... 1

SUMMARY OF ARGUMENT ..... 3

ARGUMENT ..... 4

I. THE COURT SHOULD NOT ADDRESS ISSUE OF DAMAGES BECAUSE THAT ISSUE IS NOT BEFORE THE COURT ..... 4

II. THE COURT HAS OPENED THE DOOR FOR AN AWARD OF DAMAGES TO REMEDY SIMILAR TITLE VII VIOLATIONS. ..... 7

A. The EEOC Has Recognized That the Period for Gradual Adjustment to Title VII's Demands Has Passed. ..... 11

B. Petitioners Offer No Evidence That There Will Be Large Scale Recalculations Required by a Grant of Relief in this Case. ..... 13

C. Application of the *Long* Criteria Supports the Argument that Respondents' Entitlement to Relief. ..... 15

III. THE PENSIONS THAT WORKING WOMEN EARN MUST BE VIGOROUSLY PROTECTED. ..... 18

IV. MINIMUM FUNDING STANDARDS DO NOT LIMIT THE DISTRICT COURT'S ABILITY TO AWARD MONEY DAMAGES TO RESPONDENTS IN THIS CASE ..... 23

A. The Court Should Not be Concerned with Upsetting Current Funding Standards Because These Funding Standards Change Frequently ..... 24

B. Actuarial Assumptions are More Art than Science. ..... 25

CONCLUSION ..... 28

## TABLE OF AUTHORITIES

### FEDERAL CASES

*Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955 (9th Cir. 2006) (en banc) ..... 2

*Adams v. Brink's Co.*, 372 F. Supp. 2d 854 (W.D. Va. 2005) ..... 6

*Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) ..... 7

*Arizona Governing Comm. for Tax Deferred Annuity & Deferred Comp.Plans v. Norris*, 463 U.S. 1073 (1983) ..... *passim*

*Arnold v. Storz*, No. 00-CV-4485 (CBA), 2005 WL 2436207 (E.D.N.Y. Sept. 30, 2005) ..... 6

*Bazemore v. Friday*, 478 U.S. 385 (1986) ..... 16

*Callery v. U.S. Life Ins. Co.*, 392 F.3d 401 (10th Cir. 2004) ..... 2

*Citrus Valley Estates, Inc. v. Comm'r of Internal Revenue*, 49 F.3d 1410 (9th Cir. 1995) ..... 25

*City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978) ..... *passim*

*EEOC v. Bell Atlantic Corp.*, Nos. 97 Civ. 6723(DC), 98 Civ. 3427(DC), 99 Civ. 5197(DC), 2002 WL 31260290 (S.D.N.Y. Oct. 9, 2002) ..... 11, 12

*Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989) ..... 2

*Florida v. Long*, 487 U.S. 223 (1988) ..... *passim*

*Glover v. United States*, 531 U.S. 198 (2001) ..... 5

*Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002) ..... 2

*Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000) ..... 2

*Hulteen v. AT&T Corp.*, 498 F.3d 1001 (9th Cir. 2007) ..... 3, 5

*Hulteen v. AT&T Corp.*, No. C-01-1122 MJJ, 2003 WL 25777891, (N.D. Cal. Aug. 11, 2003) ..... 5, 6

*In re Schering-Plough ERISA Litig.*, 420 F.3d 231 (3d Cir. 2005) ..... 2

*LaRue v. DeWolff, Boberg & Assocs.*,
552 U.S. __, 128 S.Ct. 1020 (2008) ..... 2

*Mendez v. Teachers Ins. & Annuity Ass'n. & Coll. Ret. Equities Fund*,
982 F.2d 783 (2d Cir. 1992) ..... 6

*Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993) ..... 2

*Metlife (Metropolitan Life Ins. Co.) v. Glenn*,
No. 06-923, 2008 WL 899290
(U.S. Mar. 31, 2008) ..... 2

*Milofsky v. Am. Airlines*,
442 F.3d 311 (5th Cir. 2006) ..... 2

*Novella v. Westchester County, N.Y. Carpenters' Pension Fund*, No. 02 Civ. 2192(BSJ)(JCF),
2007 WL 2582171,
(S.D.N.Y. Sept. 10, 2007) ..... 6

*Pallas v. Pacific Bell*,
940 F.2d 1324 (9th Cir. 1991) ..... 15, 16

*Rhoades, McKee & Boer v. United States*
43 F.3d 1071 (6th Cir. 1995) ..... 25, 27

*Steinman v. Hicks*,
352 F.3d 1101 (7th Cir. 2003) ..... 2

*United States v. Bestfoods*,
524 U.S. 51 (1998) ..... 5, 28

*Varity Corp. v. Howe*, 516 U.S. 489 (1996) ..... 2

*Wachtell, Lipton, Rosen & Katz V. Comm'r of Internal Revenue*, 26 F.3d 291 (2d Cir. 1994) ..... 25

**FEDERAL STATUTES**

Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. § 1001 *et seq.*

§ 302(a), 29 U.S.C. § 1082(a) ..... 25
§ 302(c), 29 U.S.C. § 1082(c)(3)(2002) ..... 26
§ 303, 29 U.S.C. § 1083 ..... 24, 26
§ 304, 29 U.S.C. § 1084 ..... 24
§ 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B) ..... 1

Internal Revenue Code

I.R.C. § 412(a), 26 U.S.C. § 412(a) ..... 24
I.R.C. § 412(a), 26 U.S.C. § 412(c)(3)(2002) 26
I.R.C. § 430, 26 U.S.C. § 430 ..... 24
I.R.C. § 431, 26 U.S.C. § 431 ..... 24

The Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (2006) ... 26

The Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 ..... *passim*

## OTHER AUTHORITIES

AARP FOUND. & AARP PUB. POLICY INST., POVERTY & AGING IN AMERICA: PROFILES OF THE LOW-INCOME OLDER POPULATION 4 (2008) ..... 21

Press Release, The U.S. Equal Employment Opportunity Comm'n, Class of Women to Receive $48.9 Million in EEOC-Verizon Pregnancy Bias Settlement (June 5, 2006), *available at* http://www.eeoc.gov/press/6-05-06a.html ..... 12

CINDY HOUNSELL, WOMEN'S INSTITUTE FOR A SECURE THE FEMALE FACTOR 2008: WHY WOMEN ARE AT GREATER FINANCIAL RISK IN RETIREMENT AND HOW ANNUITIES CAN HELP (2008), *available at* http://www.paycheckforlife.org/whitepapers ..... 20

INST. FOR WOMEN'S POLICY RESEARCH, IWPR #D480, THE ECONOMIC SECURITY OF OLDER WOMEN AND MEN IN THE UNITED STATES (2007) ..... 22

Kathryn J. Kennedy, *Pension Funding Reform: It's Time to Get the Rules Right (Part 1)*, TAX NOTES, Aug. 22, 2005 ..... 24

SUNHWA LEE & LOIS SHAW, AARP PUB. POLICY INST., INST. FOR WOMEN'S POLICY RESEARCH, 2008-03, FROM WORK TO RETIREMENT:TRACKING CHANGES IN WOMEN'S POVERTY STATUS (2008) ..... 18, 20

Ken McDonnell, *Retirement Annuity and Employment-Based Pension Income, Among Individuals Age 50 and Over:2006,* EMPLOYEE BENEFIT RESEARCH INSTITUTE NOTES, January 2008, *available at* www.ebri.org/publications /notes ..... 22

LESLIE E. PAPKE ET AL., THE RETIREMENT SECURITY PROJECT, NO. 2008-1, RETIREMENT SECURITY FOR WOMEN: PROGRESS TO DATE AND POLICIES FOR TOMORROW 17 (2008), *available at* www.retirementsecurityproject. org/pubs/File/RSP-PB_Women_FINAL_ 4.2.2008.pdf ..... 19

U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-105, RETIREMENT SECURITY: WOMEN FACE CHALLENGES IN ENSURING FINANCIAL SECURITY IN RETIREMENT (2007) ..... *passim*

VERIZON COMMUNICATIONS, 2007 ANNUAL REPORT (2008), *available at* http://investor. verizon.com/financial/quarterly/pdf/07_ annual_report.pdf ..... 12

KE BIN WU, AARP PUB. POLICY INST., DD161, SOURCES OF INCOME FOR WOMEN AGE 65 AND OLDER (2007) ..... 20

## STATEMENT OF INTEREST[1]

AARP is a nonpartisan, nonprofit membership organization of more than 40 million persons age 50 or older, that helps people 50+ have independence, choice and control in ways that are beneficial and affordable to them and society. Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for all. In its efforts to foster the economic security of individuals as they age, AARP seeks to increase the availability, security, equity, and adequacy of public and private pension, health, disability and other employee benefits.[2]

---

[1]The parties have consented to the filing of this brief. *Amicus curiae* AARP states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

[2]As part of its advocacy efforts to ensure, to the greatest extent possible, that participants and beneficiaries receive the benefit of ERISA's protections, AARP has participated as *amicus curiae* in numerous cases involving these protections, including the scope of a fiduciary's duties, the appropriate standard of judicial review of plan administrators' benefit eligibility determinations under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), and the scope of remedies available under ERISA's civil enforcement provisions. *See, e.g.,* Brief *Amicus Curiae* of AARP in Support of Respondent

Due to the vulnerability of retired persons, ensuring that retiring employees receive the full pension to which they are entitled is a top priority of AARP. The issues in this case directly bear on an employer's responsibility to provide all employees–both male and female–the retirement benefits that they earned. Thus, resolution of the issues in this case will have a significant impact on the way in which employers handle pension benefits and the extent to which employees can rely on the promises of their employees to provide those retirement benefits. AARP, therefore, respectfully submits this brief *amicus curiae* to facilitate the Court's decision in this case.

---

Urging Affirmance, *Metlife (Metropolitan Life Ins. Co.) v. Glenn*, No. 06-923, 2008 WL 899290 (U.S. Mar. 31, 2008); *LaRue v. DeWolff, Boberg & Assocs.*, 552 U.S. __, 128 S.Ct. 1020 (2008); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Harris Trust & Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000); *Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955 (9th Cir. 2006) (en banc); *Milofsky v. Am. Airlines*, 442 F.3d 311 (5th Cir. 2006); *In re Schering-Plough ERISA Litig.*, 420 F.3d 231 (3d Cir. 2005); *Callery v. U.S. Life Ins. Co.*, 392 F.3d 401 (10th Cir. 2004); *Steinman v. Hicks*, 352 F.3d 1101 (7th Cir. 2003).

## SUMMARY OF ARGUMENT

The Court should uphold the Ninth Circuit's *en banc* decision that AT&T's post-Pregnancy Discrimination Act ("PDA") calculation of retirement benefits for Respondents violated the PDA. *Hulteen v. AT&T Corp.*, 498 F.3d 1001, 1015 (9th Cir. 2007). Issues pertaining to damages in this case should not now be considered because the question before the Court is limited to AT&T's liability for the Title VII violations. However, if the Court considers the concerns raised by Petitioner's *amici*, then the Court needs also to consider that it is essential to vigorously protect the pensions that women accumulate throughout their working lives due to distinct disadvantages that women entering retirement face. Moreover, affirming AT&T's liability will not have the dire effects warned of by Petitioner's *amici*. Finally, contrary to the claims asserted in the brief of *amicus curiae* the ERISA Industry Committee, the minimum funding standards in the Employee Retirement and Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, do not limit the district court's power to award relief to Respondents for AT&T's current Title VII and PDA violations in the calculation of Respondents' pension benefits.

## ARGUMENT

### I. THE COURT SHOULD NOT ADDRESS ISSUE OF DAMAGES BECAUSE THAT ISSUE IS NOT BEFORE THE COURT.

The ERISA Industry Committee ("ERIC") references the potential harms that *could* result from "a judicial decision leading to an increase in the plan's benefit obligations," citing a "significant risk that the plan will have insufficient resources to cover the new obligations." ERIC Br. 4. However, this argument is unfounded speculation and it comes prematurely. On appeal, the Court is determining whether AT&T is liable for a current violation of the PDA in computing the retirement benefits of female employees who took maternity leaves prior to the passage of the PDA. This is a question of AT&T's liability and thus it is a determination that must be made prior to any consideration of appropriate relief. Consequently, abstract analysis of the financial aspects and claimed threat to the financial soundness of AT&T's pension system is premature and improper.

The district court has yet to address the issue of proper relief in this case. Indeed, the district court made clear that the litigation in the case would proceed in three phases:

> The case is currently situated in Phase I, and the present summary judgment motions are

> the vehicle to determine initial liability. Phase II will concern secondary liability and class certification issues, should any of plaintiffs' claims remain after summary judgment and subsequent appeals. Phase III will then address the issue of damages.

*Hulteen v. AT&T Corp.*, No. C-01-1122 MJJ, 2003 WL 25777891, at *1 (N.D. Cal. Aug. 11, 2003). In its 2007 *en banc* decision, the Ninth Circuit affirmed only the district court's grant of summary judgment in favor of Respondents on their Title VII claims. *Hulteen*, 498 F.3d at 1015 (9th Cir. 2007).

The district court has not developed a record on the question of what damages would be appropriate, and therefore the Court should not address this issue prematurely. *See Glover v. United States*, 531 U.S. 198, 205 (2001); *United States v. Bestfoods*, 524 U.S. 51, 72-73 (1998). It is a well-established principle that the Court does not "decide questions neither raised nor resolved below" or "decide issues outside the questions presented by the petition for certiorari." *Glover*, 531 U.S. at 205. The question of what remedy would be appropriate in the event of liability is one properly addressed in the first instance by the district court. *Bestfoods*, 524 U.S. at 72-73. Should the issue of liability be resolved in favor of Respondents, this case should be remanded to the district court on the issues of secondary liability, class certification, and damages

in accordance with the separate phases outlined by the district court below. *See Hulteen*, 2003 WL 25777891, at *1.

The district court had no opportunity to review evidence and make findings as to the effect that the requested relief may have on the pension plan of AT&T or employers generally. Further, where there is no legitimate concern that awarding benefits against a plan would compromise the plan's actuarial soundness, courts have routinely awarded such benefits. *See, e.g., Mendez v. Teachers Ins. & Annuity Ass'n. & Coll. Ret. Equities Fund*, 982 F.2d 783, 789 (2d Cir. 1992) (awarding attorneys fees against pension fund in ERISA action); *Novella v. Westchester County, N.Y. Carpenters' Pension Fund*, No. 02 Civ. 2192(BSJ)(JCF), 2007 WL 2582171, at *3 (S.D.N.Y. Sept. 10, 2007) (awarding benefits against a plan and rejecting argument that to do so would "wreak havoc with Taft-Hartley Funds, such as defendant, which rely on actuarial soundness for their very continued existence"); *Adams v. Brink's Co.*, 372 F. Supp. 2d 854, 908 (W.D. Va. 2005) (refusing to require participant to repay overpaid funds to the plan where "the entire blame for the miscalculations of [the participant's] early retirement benefits lies with the Pittston Plan and with the Pittston employees who were entrusted with the task"); *Arnold v. Storz*, No. 00-CV-4485 (CBA), 2005 WL 2436207, at *8 (E.D.N.Y. Sept. 30, 2005) (awarding benefits against a plan where "there are assurances that the actuarial soundness of the

fund is not in jeopardy"). Therefore, if the district court finds that an award to Respondents in this case would not upset the actuarial soundness of AT&T's pension plan and an award in other similar cases would not upset the actuarial soundness of the pension plans of other employers, then the district court can award the requested relief. Because the record contains no basis for a determination on that point, then it is premature for the Court to address the issue of damages.

## II. THE COURT HAS OPENED THE DOOR FOR AN AWARD OF DAMAGES TO REMEDY SIMILAR TITLE VII VIOLATIONS.

If the Court does respond to the highly charged protest about a damages award in this case, then it should consider the compelling precedent that allows an award of damages to remedy similar Title VII violations.

Remedying injuries caused by employment discrimination is the purpose of Title VII. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). The plain language of the statute as well as the legislative history give effect to this purpose. *Moody*, 422 U.S. at 419 & n.11. As a result, upon a finding of liability, a court must fashion an award to remedy the violation of Title VII . *See Arizona Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris*, 463 U.S. 1073, 1093 (1983) ("Absent

special circumstances a victim of a Title VII violation is entitled to whatever retroactive relief is necessary to undo any damage resulting from the violation."); *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 703, 719 (1978) ("The *Albemarle* presumption in favor of retroactive liability can seldom be overcome, but it does not make meaningless the district courts' duty to determine that such relief is appropriate."); *Moody,* 422 U.S. at 421 ("[G]iven a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.").

The district court here has had no opportunity to determine how the actuarial balance of AT&T's plan would be affected by awarding the Respondents their requested relief. The ERISA Industry Committee (ERIC) cites to *Florida v. Long*, 487 U.S. 223 (1988), *Norris*, and *Manhart* to support its argument that the Respondents should have no remedy for AT&T's violation of their rights under Title VII.[3] But ERIC reads these cases too broadly.

The plaintiffs in *Manhart* were female employees of the Los Angeles Department of Water

[3] Notably, in the cases cited in ERIC's brief, the district courts had already awarded relief; this Court was reviewing the propriety of the remedies awarded. *See Norris,* 463 U.S. at 1079; *Long*, 487 U.S. at 228-29; *Manhart,* 435 U.S. at 718.

and Power ("Department") and their union, the International Brotherhood of Electrical Workers, Local Union No. 18, who challenged the Department's requirement that female employees make 14.84% larger contributions than male employees to their pension fund. *Manhart*, 435 U.S. at 704-05. Although the Department awarded equal monthly retirement benefits to male and female employees of the same age, seniority and salary, the Department required this larger contribution from female employees based on actuarial calculations that took into account women's longer average life expectancy. *Id.* at 705. The plaintiffs brought suit against the Department for violating the provision of the Civil Rights Act of 1964 that makes it unlawful for an employer to discriminate against any individual on the basis of sex. *Id.* at 704, 706. The Court held that this employment practice was "in direct conflict with both the language and the policy of the [Civil Rights Act of 1964]." *Id.* at 711. Nevertheless, the Court declined to award damages in that case, citing to the harm that would result from requiring pension funds to shoulder such an unexpected burden. *Id.* at 723. The Court noted that "the prohibition against sex-differentiated employee contributions represent[ed] a marked departure from past practice." *Id.* at 722.

In *Norris*, the State of Arizona permitted employees interested in enrolling in a retirement plan to select from one of a number of companies with which the employee could invest his or her

funds. *Norris*, 463 U.S. at 1075-76. The State was responsible for withholding the appropriate amount of the employee's wages and sending that withholding to the company chosen by the employee. *Id.* at 1077. The Court relied on *Manhart* to hold that an employer may not offer its employees retirement benefits from a private insurance company that used sex-based mortality tables to calculate monthly retirement benefits, but it declined to allow relief for pre-*Manhart* violations. *See id.* at 1074-75, 1105-07.

Finally, in *Long*, the Court contended with the propriety of awarding compensation for the underpayment of pension benefits to employees based on the use of sex-based actuarial tables. *See Long*, 487 U.S. at 227-29. *Long* involved the State of Florida's employee retirement program, which was funded by contributions from state and local government employers with equal contributions for male and female employees who had the same age, seniority and service. *Id.* at 227. Due to the use of sex-based actuarial tables, the equal contributions resulted in the unequal payments of benefits to male and female employees. *Id.* at 227. After the decision in *Norris,* the Florida program adopted unisex actuarial tables that required equal contributions and paid out equal benefits to similarly-situated male and female employees. *Id.* at 227-28. Additionally, the class of employees in *Long* all retired before *Norris*. *Id.* at 240. The Court

reasoned that on this basis the employees were not entitled to relief. *Id.* at 240.

### A. The EEOC Has Recognized That the Period for Gradual Adjustment to Title VII's Demands Has Passed.

The ERIC brief cites to *Manhart* for the proposition that the EEOC has recognized that administrators of retirement plans should be given adequate time to "adjust gradually to Title VII's demands." ERIC Br. 11 (citing *Manhart*, 435 U.S. at 721-22). *Manhart* was decided in 1978. Given that Title VII was enacted in 1964 and ERISA was enacted ten years later in 1974, *Manhart* came before the Court when those two laws for the protection of females in the workplace were still in their formative stages and employers were still adjusting to their new requirements. But thirty years beyond *Manhart*, employers, as well as the EEOC, have had the time to adjust.

In fact, in 2002 the EEOC filed a suit on behalf of current and former female employees against Bell Atlantic Corporation (now Verizon) for violations of Title VII and the PDA in U. S. district court in the Southern District of New York. *See EEOC v. Bell Atlantic Corp.*, Nos. 97 Civ. 6723(DC), 98 Civ. 3427(DC), 99 Civ. 5197(DC), 2002 WL 31260290, at *1-2 (S.D.N.Y. Oct. 9, 2002). The EEOC alleged that prior to 1979, defendants had certain discriminatory policies that, among other

things, denied service credits to female employees during pregnancy leave. *Id.* at *1. When defendants implemented a Force Adjustment Plan Retirement Incentive ("FAP") in 1994, which calculated retirement benefits in part on an employee's length of service, some females were ineligible for benefits under the FAP because they were not credited with their pre-1984 pregnancy leaves. *Id.*

In the settlement agreement approved by the court, Verizon agreed to provide additional service credits to the class members, which would increase the class members' pension benefits. *Id.* at *2. Although the settlement agreement does not allow each class member to recoup all of her lost time while on pre-1984 pregnancy leave, the terms of the settlement require defendants to pay money damages to the class members. *See id.* at *2-3. In fact, as of 2006, Verizon is anticipated to pay approximately $48.9 million to 12,326 current and former female employees. Press Release, The U.S. Equal Employment Opportunity Comm'n, Class of Women to Receive $48.9 Million in EEOC-Verizon Pregnancy Bias Settlement (June 5, 2006), *available at* http://www.eeoc.gov/press/6-05-06a.html. Verizon's 2007 operating revenues totaled $93,469,000,000. VERIZON COMMUNICATIONS, 2007 ANNUAL REPORT 17 (2008), *available at* http://investor.verizon.com/financial/quarterly/pdf/07_annual_report.pdf. To put this settlement in perspective, this payout represents only .052% of Verizon's operating revenue for 2007.

### B. Petitioners Offer No Evidence That There Will Be Large Scale Recalculations Required by a Grant of Relief in this Case.

Another distinguishing factor of *Manhart* and its progeny is that in those cases the Court was faced with benefit recalculations on a massive scale. Because the practice of requiring females to contribute more to pension funds than males was so widespread, a damages remedy to correct the problem would have required a significant number of employer-sponsored pension funds to recalculate the benefits accrued by all its female employees over their entire careers. *See Manhart,* 435 U.S. at 721 (noting that, at the time, "[f]ifty million Americans participate[d] in retirement plans other than Social Security"). Although the Court in *Manhart*, did not provide specific data as to how many employers would be affected by its decision, the Court cited to the "danger of 'staggering damage awards'" that could result from granting relief to make up for gender-based pension plan calculations. *Manhart*, 435 U.S. at 723. Additionally, in *Long*, the Court concluded that awarding damages for past violations of Title VII was inequitable in that case. *Long*, 487 U.S. at 235. The Court relied on hard data to make this conclusion. First, the Court cited to a survey of Fortune 500 companies that showed that nearly 40% of those companies had used unlawful tables prior to *Norris*. *Id.* at 236. Furthermore, the Court cited to a Department of Labor study that found that

"substantial percentages" of pension plans used the sex-based mortality tables in calculating pension benefits estimating that 74% of participants in defined contribution plans and 45% of participants in defined benefit plans received benefits on these calculations. *Id.* at 233-34.

But in the current case there is simply no evidence in the record that the recalculations requested by the Respondents would have any such large scale effect, and Petitioner's *amici* do not provide any specific data to this effect in their briefs. In reality, three key facts significantly limit the scope of the rule established below. First, the only employees who would benefit from this rule are women who both took pre-PDA pregnancy leave and have recently retired or are eligible to retire in the future. This is in stark contrast to the *Manhart* rule, which would have applied to all women whose pension benefits were calculated in the manner struck down in that case. Second, any leave to which this rule would apply was likely only for brief periods of time—the duration of pregnancy-related disability. In contrast, the *Manhart* rule would have applied to all pension credits accrued by women over their entire careers. Finally, the rule below might only apply to a narrow group of employers—those who, like AT&T, both (a) denied service credit to women on pre-PDA pregnancy-related leave while awarding such credit to employees on non-pregnancy-related short-term disability leave and (b) calculated benefits after 1979 based on a service

credit accrual policy in effect before the PDA became effective. There is neither evidence in the record regarding how many women, how much leave time, and how many employers would be affected here, nor have *amici* offered any such information. Thus, there is no basis upon which to determine at this stage what the impact of the rule articulated below would be.

### C. Application of the *Long* Criteria Supports the Argument that Respondents' Entitlement to Relief.

In *Long*, the Court spelled out three criteria "for determining whether retroactive awards are appropriate in Title VII pension cases involving the use of sex-based actuarial tables." *Long,* 487 U.S. at 230. In using the concept of "retroactive award," the Court is merely referring to a grant of relief for past Title VII violations. The ERIC brief cites to the three criteria spelled out in *Long* to advance the argument that the award of damages for past violations of the PDA would be improper. The first criterion is "whether the decision established a new principle of law, focusing, in this context, on whether *Manhart* clearly defined the employer's obligations under Title VII with respect to benefits payments." *Long*, 487 U.S. at 230. That it is unlawful to deny any female employee service credits for pregnancy-related disability leave in the computation of her retirement benefits is now beyond argument. 42 U.S.C. § 2000e(k); *see Pallas v. Pacific Bell*, 940 F.2d

1324, 1326 (9th Cir. 1991). ERIC argues that the unlawfulness of denying service credits to female employees who took pre-PDA pregnancy leave was not established when the cap on service credits for female employees taking pregnancy leave was implemented (pre-PDA). That is not the issue here, which is instead concerned with the unlawfulness of denying the service credits *now that the retirement benefits are being computed.* The unlawfulness of making post-Title VII decisions regarding benefits on discriminatory pre-Title VII calculations is clearly established. *Bazemore v. Friday*, 478 U.S. 385, 395-96 (1986) (holding employer liable for violation of Title VII for paying black employees less than white employees after the enactment of Title VII even though that pattern of behavior began before enactment of Title VII). If liability is upheld, no new principle of law will be established. Indeed, Petitioners's liability has been clear since at least 1991. *Pallas,* 940 F.2d at 1327 (relying on *Bazemore* to hold that the district court erred in dismissing Pallas' claim that her employer violated the PDA for its post-PDA decision to discriminate against its employee for pre-PDA computation of employees' service credits).

The second *Long* criterion is "to test whether retroactive awards are necessary to the operation of Title VII principles by acting to deter deliberate violations or grudging compliance." *Long*, 487 U.S. at 230. Here, the awarding of damages is necessary to the operation of Title VII because it would require

that AT&T *not* violate the PDA by applying a pre-PDA service computation to a current computation of pension benefits. Moreover, a grant of relief in this case would deter "grudging compliance" of other employers who are computing the retirement benefits of female employees who took pre-PDA pregnancy leaves. Additionally, granting relief to Respondents will require AT&T's pension plan to make redress for its improper denial of service credit to the named plaintiffs as well as to the class members. Verizon is expected to pay $48.9 million. See supra 13. Other companies will be apprised of the result in this case, and they can start to plan for readjusting their own pension funds to account for future payments that will have to be made to similarly-situated female employees.

The final *Long* criterion is "to ask whether retroactive liability will produce inequitable results for the States, employers, retirees, and pension funds affected by our decision." *Long*, 487 U.S. at 230. This criterion shows that this question is premature, since no one knows how a finding of liability will affect employers or pension funds. Petitioners neither present information on what kind of costs the imposition of liability would impose on the fund nor project exactly how many employees would be affected by an award of damages. Based upon the current record, it is beyond the power of the litigants, much more *amici*, to protest that an award of damages would produce "inequitable results."

## III. THE PENSIONS THAT WORKING WOMEN EARN MUST BE VIGOROUSLY PROTECTED.

Although consideration of damages in this case is premature, should the Court consider damages, it should undertake to do so in light of the particular needs of women in retirement. As compared to men, women in general have less access to financial resources in retirement but will need more resources than men. Consequently, women who are forced to rely on public resources—such as the Social Security system, food stamps, etc.—will not have enough resources for an adequate level of retirement security. In refusing to credit Respondents for their time worked and denying Respondents the full pension benefits to which they should be entitled, AT&T, by failing to provide equal pension benefits for equal work, is shifting the burden of its responsibility for an adequate level of retirement security onto public programs that are neither intended nor equipped to handle such demands.

The availability of financial resources in retirement depends in large part on a woman's labor market participation. SUNHWA LEE & LOIS SHAW, AARP PUB. POLICY INST., INST. FOR WOMEN'S POLICY RESEARCH, 2008-03, FROM WORK TO RETIREMENT: TRACKING CHANGES IN WOMEN'S POVERTY STATUS 2-3 (2008). Although women have made great strides in improving their labor force participation during the

past half century, their participation continues to be more intermittent than the labor force participation of men. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-105, RETIREMENT SECURITY: WOMEN FACE CHALLENGES IN ENSURING FINANCIAL SECURITY IN RETIREMENT 12 (2007) [hereinafter GAO REPORT]. Moreover, the work experience that women do have does not necessarily translate into higher income in retirement. LEE & SHAW, *supra,* at 3. Therefore, it is crucial that women be awarded the full pension benefits to which their work history entitles them.

Despite the difficulties in securing adequate retirement income, women in our nation have a great need for retirement security. Their special circumstances are created by a variety of factors that generate this need. Married women tend to outlive their husbands, which contributes to the need for more resources in retirement. LESLIE E. PAPKE ET AL., THE RETIREMENT SECURITY PROJECT, NO. 2008-1, RETIREMENT SECURITY FOR WOMEN: PROGRESS TO DATE AND POLICIES FOR TOMORROW 17 (2008), *available at* www.retirementsecurityproject.org/pubs/File/RSP-PB_Women_FINAL_4.2.2008.pdf ("[W]omen will have greater need for retirement resources because they tend to outlive their husbands, face a decline in income at widowhood and incur out-of-pocket medical expenses from their husband's death or their own medical needs."). For both married and single women, an increase in health costs during aging requires greater retirement resources. GAO REPORT, *supra*, at 28

(attributing women's longer life spans to requiring more long-term care and consequently the financing for that care); CINDY HOUNSELL, WOMEN'S INSTITUTE FOR A SECURE RETIREMENT, THE FEMALE FACTOR 2008: WHY WOMEN ARE AT GREATER FINANCIAL RISK IN RETIREMENT AND HOW ANNUITIES CAN HELP 13-14 (2008), *available at* http://www.paycheckforlife.org/whitepapers (go to "The Female Factor 2008" heading, click on link that says "[t]o read more, please click here") (attributing an increase in elderly women's health costs to caring for a spouse and caring for themselves and citing studies that show that women are more likely to enter nursing homes and are less likely to have a family care-giver to care for them); LEE & SHAW, *supra,* at 4. Additionally, women live longer and as a result require that their financial resources extend longer. *See* GAO REPORT, *supra*, at 28; HOUNSELL, *supra*, at 14 (describing the challenges than many women face in effectively planning for a retirement that can last twenty to thirty years or more).

Retirement income for both men and women come from a number of sources, including Social Security and other public resources, pensions, savings, and earnings from work. KE BIN WU, AARP PUB. POLICY INST., DD 161, SOURCES OF INCOME FOR WOMEN AGE 65 AND OLDER 1 (2007). For women, pensions are a critical source because of the unreliability and inadequacy of the other sources. First, the social security system and other public resources are inadequate to provide long-term

retirement financing to retirees. GAO REPORT, *supra*, at 9 (attributing the shortfall to "longer life spans and lower birthrates"). Despite this inadequacy, older persons (especially among the group age 50 to 64) living in poverty rely heavily on public benefits like Medicaid, Supplemental Security Income, public housing, and food stamps. AARP FOUND. & AARP PUB. POLICY INST., POVERTY & AGING IN AMERICA: PROFILES OF THE LOW-INCOME OLDER POPULATION 4 (2008) [hereinafter POVERTY & AGING IN AMERICA]. Women are generally, although not always, more likely than men to receive these public benefits. *Id.*

Savings is also not adequate. Few Americans are actually saving, *see* GAO REPORT, *supra*, at 10 (reporting that the U.S. personal saving rate has fallen to levels not seen since the Great Depression), and historically, women do not save as much as men. GAO REPORT, *supra*, at 10. A woman's traditional role as mother and provider of childcare—a role that undeniably benefits society—can limit her ability to save. Child care and elder care obligations can cause a woman to take years away from the work force or to limit her work force participation to part-time work. POVERTY & AGING IN AMERICA, *supra,* at 23; WU, *supra*, at 3.

Finally, earnings from work do not constitute a reliable source of retirement income. Although women in retirement work for a number of reasons (including financial need and enjoyment of work),

the percentage of women receiving earnings from work was a mere 13.4 percent in 2005. WU, *supra*, at 3-4 (citing the U.S. Bureau of the Census March 2006 survey).

The customary lifetime work pattern for women described above leaves one component of the catalogue of financial resources that can be significant in retirement: pensions. Despite great gains in labor market participation, however, women historically receive far less in pensions than men receive. Although the statistics vary a bit, studies have shown that a typical woman receiving a pension receives about half what a man receives. GAO REPORT, *supra*, at 14 (citing a 2004 study that reports that the median pension income for men was $12,000 and the median pension income for women was $6,141); INST. FOR WOMEN'S POLICY RESEARCH, IWPR #D480, THE ECONOMIC SECURITY OF OLDER WOMEN AND MEN IN THE UNITED STATES 1 (2007) (stating that for women who receive pensions, the typical woman receives about $6,388 while the typical man receives about $11,971). *See also* Ken McDonnell, *Retirement Annuity and Employment-Based Pension Income, Among Individuals Age 50 and Over: 2006,* EMPLOYEE BENEFIT RESEARCH INSTITUTE NOTES, January 2008, at 3, *available at* www.ebri.org/publications/notes (click on "January 2008") (describing a study showing that, in comparing women who receive pension benefits to males, the mean benefit of the woman would be only 65% of that received by a man in the same group).

Despite their demonstrated greater need and the variety of sources from which they can accumulate retirement income, women do not have as much retirement income as men. WU, *supra*, at 1; GAO REPORT, *supra*, at 12 (citing to women's "lower labor force attachment and lower earnings" as the reason for not having as much retirement income). In fact, upon entering retirement, women are at a substantially greater risk of poverty than men, despite declining poverty rates in the elderly population since the 1960s. LEE & SHAW, *supra,* at 2.

Consequently, older women constitute a very vulnerable population. They live longer so they require more financial resources in retirement; however, they are frequently not able to rely on their pensions in retirement. As a result, the pensions that women do accumulate must be vigorously protected. AT&T has the responsibility to Respondents to award them pension benefits equal to other employees with similar work and credited leave histories.

## IV. MINIMUM FUNDING STANDARDS DO NOT LIMIT THE DISTRICT COURT'S ABILITY TO AWARD MONEY DAMAGES TO RESPONDENTS IN THIS CASE.

The briefs of both the ERISA Industry Committee and the Equal Employment Advisory Council argue that the funding of pension plans will be in danger if the Court permits the awarding of

service credits to the Respondents. *See* Equal Employment Advisory Council Br. 20-21; ERIC Br. 15-17. Contrary to this "sky is falling" argument, the funding of pension plans is not an exact science and there is simply no evidence in the record that the adjustments required by the Ninth Circuit's decision will bankrupt the pension system for AT&T or any employer that is required to credit female employees' pre-PDA pregnancy leave.

### A. The Court Should Not be Concerned with Upsetting Current Funding Standards Because These Funding Standards Change Frequently.

Both ERISA and the Internal Revenue Code prescribe minimum funding standards for pension plans. *See* ERISA § 303, 29 U.S.C. § 1083; I.R.C. § 430, 26 U.S.C. § 430 (describing minimum funding standards for single-employer defined benefit pension plans); ERISA § 304, 29 U.S.C. § 1084; I.R.C. § 431, 26 U.S.C. § 431 (describing minimum funding standards for multiemployer plans). These rules require that pension plans satisfy the relevant minimum funding standards. ERISA § 302(a), 29 U.S.C. § 1082(a); I.R.C. § 412(a), 26 U.S.C. § 412(a). As a result of ongoing efforts to change and improve these funding standards, the minimum standards are constantly changing. *See generally* Kathryn J. Kennedy, *Pension Funding Reform: It's Time to Get the Rules Right (Part 1)*, TAX NOTES, Aug. 22, 2005, at 917-21 (describing the evolution of various

pension funding rules). Because these minimum standards are frequently changed, they should not prevent an award of money damages to Respondents to account for the miscalculation of the length of service of female employees whose pregnancy leaves were not credited in the years prior to the passage of the PDA.

### B. Actuarial Assumptions are More Art than Science.

The actuarial assumptions that dictate how a plan will meet the minimum funding standards are more art than science. *See Citrus Valley Estates, Inc. v. Comm'r of Internal Revenue,* 49 F.3d 1410, 1412-13 (9th Cir. 1995) ("Even with the statutory guidelines, however, plan funding often involves more art than science, because the ultimate cost of a plan cannot be calculated in advance with any certainty."); *Rhoades, McKee & Boer v. United States*, 43 F.3d 1071, 1073-75 (6th Cir. 1995) (emphasizing the importance of the actuary's assumptions and grappling with the kind of test to use to evaluate whether an actuary employed reasonable assumptions); *Wachtell, Lipton, Rosen & Katz v. Comm'r of Internal Revenue*, 26 F.3d 291, 296 (2d Cir. 1994) (upholding the tax court's determination that the actuarial assumptions at issue were reasonable "provided that the chosen assumption is the actuary's best estimate of anticipated plan experience"). Because of the uncertainties connected with pension funding, the

pension funding rules require that employers have adequate reserves so that they can handle unforeseen required payments. Any potential harm to pension solvency that a ruling in favor of Respondents *could* cause has not been demonstrated by Petitioner or *amici* in this case.

Plan minimum funding standards must be based on *reasonable* actuarial assumptions. For all plans that are not multi-employer plans, all costs, liabilities, rates of interest, and other factors under the plan shall be determined on the basis of actuarial assumptions and methods

> each of which is *reasonable* (taking into account the experience of the plan and reasonable expectations) or which, in the aggregate, result in a total contribution equivalent to that which would be determined if each such assumption and method were *reasonable* and which, in combination, offer the actuary's *best estimate* of anticipated experience under the plan.

26 U.S.C. § 412(c)(3) (2002); 29 U.S.C. 1082(c)(3) (2002) (emphasis added)[4]. This standard of

---

[4] This language references older versions of the U.S. Code. The Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (2006), modified the placement and language of this rule regarding actuarial assumptions. *See, e.g.,* 29 U.S.C. § 1083(h)(1) (requiring that, for single-employer defined benefit plans, the actuarial assumptions and methods "each of which is reasonable

reasonableness reflects the fact that no actuary is able to predict with absolute certainty the challenges that will affect plan funding. *See Rhoades,* 43 F.3d at 1073.

Consequently, plans must remain flexible so as to be able to satisfy an award of money damages, like the kind requested by Respondents in this case, as part of their responsibility to account for unanticipated events that were not within the actuary's calculations. The AT&T plan—just as all other plans that refuse to include participants' pre-PDA pregnancy leaves—are presumably well able to maintain such flexibility.

---

(taking into account the experience of the plan and reasonable expectations), and which, in combination, offer the actuary's best estimate of anticipated experience under the plan").

## CONCLUSION

The ERISA Industry Committee's brief is at best premature and at worst an excited effort to influence the Court's finding on liability through unfounded speculation that the relief requested, but not yet determined, would wreak havoc on pension fund stability. Because the district court has not developed a record on the question of remedies in this case, nothing but speculation as to the impact of a hypothetical remedy is even possible at this stage. *See Bestfoods*, 524 U.S. at 72-73 (1998).

For the foregoing reasons, the judgment of the Court of Appeals *en banc* should be affirmed.

Respectfully submitted,

JAY E. SUSHELSKY
Counsel of Record
AARP FOUNDATION LITIGATION

MELVIN RADOWITZ
AARP

601 E Street, NW
Washington, DC 20049
(202) 434-2060

COUNSEL FOR *A*MICUS *C*URIAE AARP